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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
09/053,346	04/01/98	ROGONE	M 18661-000100

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EXAMINER

KEARNEY, R

ART UNIT

PAPER NUMBER

3739

DATE MAILED:

09/13/00

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.

09/053346

Applicant(s)

Rogone et al.

Examiner

Kearney

Group Art Unit

3139

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Status

- ☒ Responsive to communication(s) filed on 4/5/00
- ☒ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-12, 24-26 is/are pending in the application.
- Of the above claim(s) _____ is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-12, 24-26 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement.

Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
 - ☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been received.
 - ☐ received in Application No. (Series Code/Serial Number) _____
 - ☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☐ Interview Summary, PTO-413
- ☐ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Other _____

Office Action Summary

Art Unit: 3739

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-7, 9, 17, 24 and 25 continue to be rejected under 35 U.S.C. 102(b) as being anticipated by Hogan. Hogan discloses a thermal and moisture barrier including a flexible cover (20), at least one opening (24) including a self-acting diaphragm closing. **Regarding claim 6** Figure 3 illustrates a rectangular sheet pivotally coupled by a flexible seam at its edges to flap portions. The flap portions are clearly illustrated as overhanging a support framework (22). **Regarding claims 6 and 16** see Figure 1. **Regarding claim 10** (22) illustrates a side panel surrounding a mattress (12) and cover (20) clearly overhangs the side panel. **Regarding claim 17** Figure 3 illustrates an edge of the cover (20) creating a seal with the mattress (22).

Art Unit: 3739

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 10-14 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barsky in view of Goertzel. Barsky discloses a system or incubator for providing a thermal environment comprising a radiant warmer (14) and a substantially flexible cover (32). Barsky teaches all of the limitations of the claims except an opening through the flexible cover. Goertzel discloses an incubator and teaches that it is old and well known in the art to provide an opening (16) through the flexible cover of the incubator. To have provided the Barsky device with an opening through the cover would have been an obvious modification, particularly in view of the teaching of Goertzel.

5. Claim 8 continues to be rejected under 35 U.S.C. 103(a) as being unpatentable over Hogan. Hogan explicitly teaches all of the limitations of the claims except the cover defining a half section of a truncated right circular cylinder enclosure. It would have been obvious to one of ordinary skill in the art at the time the invention was made to construct the Hogan of a shape that defines a truncated right circular cylinder enclosure since a simple redesign modifying the shape of a preexisting apparatus only involves routine skill in the art.

6. Claims 15 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barsky.

Art Unit: 3739

Barsky teaches all of the limitations of the claims except the specific shape of the cover as claimed. To have modified the shape of the Barsky cover would have been obvious to one of ordinary skill in the art based on a simple choice of design.

Response to Arguments

7. Applicant's arguments filed 4/5/00 have been fully considered but they are not persuasive. Applicant has amended the preamble of the claims to recite a bed portion having upwardly extending panels in an attempt to overcome the Hogan reference. However, the bed portion having upwardly extending panels has not been positively recited as a structural limitation of the claims. The structural limitations of the claim refer to a device which can be used with a bed portion having upwardly extending panels. Since Hogan teaches all of the structural limitations of the claims, the Hogan apparatus can be used with a bed having upwardly extending panels.

In response to applicant's argument that the enclosed space provides a neutral thermal micro environment, within the incubation chamber, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

Art Unit: 3739

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Rosiland Kearney whose telephone number is (703) 308-2711. The examiner can normally be reached on Mondays through Fridays from 9:00 AM to 4:00 PM.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0858.

Application/Control Number: 09/053346

Page 6

Art Unit: 3739

RK

August 29, 2000

A handwritten signature in black ink, appearing to read 'Linda C. M. Dvorak', with a large, stylized loop at the end.

LINDA C. M. DVORAK
SUPERVISORY PATENT EXAMINER
GROUP 3700